UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In re: VIOXX LITIGATION CONSORTIUM,	)	NO. 09-30946
Petitioners.	)	

ORIGINAL PROCEEDING FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA THE HONORABLE ELDON E. FALLON PRESIDING IN IN RE VIOXX PRODUCTS LIABILITY LITIGATION, MDL 05-1657

THE VIOXX LITIGATION CONSORTIUM'S OBJECTION TO BIRCHFIELD'S AND HERMAN'S RESPONSES, AND REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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OBJECTION TO HERMAN AND BIRCHFIELD'S UNREQUESTED RESPONSES

One of Plaintiffs' Co-lead Counsel Andy Birchfield, and Plaintiffs' Liason Counsel Russ M. Herman have filed responses to the Consortium's Petition for Writ of Mandamus despite the facts that (1) neither was asked by this Court to respond, and (2) neither is a real party in interest in this proceeding. Mandamus is an original proceeding in which parties must demonstrate an actual interest to have standing to participate.[1] Because any judgment resulting from this proceeding will not affect Birchfield or Herman's cognizable interests, neither has standing and their briefs should be rejected.

In this proceeding, the Consortium seeks relief from two orders of the trial court withholding from Consortium attorneys a portion of attorneys' fees to which Consortium attorneys are indisputably entitled. Neither Birchfield nor Herman has made any claim to the portion of fees improperly withheld by the trial court's orders. Birchfield and Herman have no interest in the continued, improper, withholding of these fees; neither asserts such an interest.

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[1] *See United States v. McVeigh*, 106 F.3d 325, 334 (10th Cir. 1997) ("Article III standing is a jurisdictional requisite at every stage of the proceeding ... failure to satisfy constitutional standing requirements would preclude our consideration of ... their petition for mandamus relief.") (internal quotations omitted); *see also Normandy Beach Development Co., et al., v. United States ex rel. Brown-Crummer Inv. Co.*, 69 F.2d 105 (5th Cir. 1934) ("The judgment in the mandamus suit does not, and in the nature of things could not, run against appellants; and so they had no standing to assign error or appeal.").

Herman states that his interest is in "protecting the integrity and transparency" of the trial court's processes of awarding attorneys' fees.[2] Birchfield's interest is in expressing "his conviction that Judge Fallon acted well within his authority when issuing Pretrial Order 49."[3] These "interests" are purely academic, and do not give them standing to file responses.[4]

Herman's brief includes an inappropriate, inaccurate and wholly irrelevant *ad hominem* attack based on the complaint filed by one (out of several thousand) of the Consortium's former clients in the underlying proceeding.[5] Had Herman conducted the slightest investigation to determine whether there was a good faith basis for the former client's allegations, he would have found none. This Court should reject both unelicited and improper briefs.

SUMMARY OF ARGUMENT IN REPLY

In this mandamus proceeding, the Consortium seeks relief from two trial court orders, 49 and 50. Order 49 escrows a portion of Vioxx settlement funds (24%) to which Consortium attorneys are indisputably entitled. Order 50 permits those funds to be released only if the Consortium executes a court-provided release requiring it to abandon its appeal of an earlier trial court order which *sua sponte* capped contingency fees at 32%. The Consortium's appeal of the trial court's 32%

[2] Herman Response at i.
[3] Birchfield Response at 4.
[4] *Normandy Beach Development Co.*, 69 F.2d at 105 ("parties who are only collaterally or incidentally interested are not entitled to come in and defend the action" on mandamus).
[5] Herman Response at 11-12.

order will have no effect on the 24% of settlement payments that the trial court has improperly escrowed. The trial court's orders can only be considered punitive measures against the Consortium for appealing the 32% order.

The Hon. Judge Fallon filed no response to the Consortium's petition for writ of mandamus. Birchfield and Herman have arrogated themselves as his responders.[6] Both Birchfield and Herman assert – with no plausible explanation – that the Consortium's 32% appeal creates uncertainty as to the 24% of fees escrowed by the trial court. In fact, there is no possibility that the Consortium's appeal of the trial court's 32% order – in which it argues only for its contractually-agreed upon rate – will result in attorneys' fees of less than 32%. No possible justification for the trial court's orders exists. The Court should issue the writ of mandamus because Pretrial Orders 49 and 50 place impermissible restraints on the Consortium's exercise of its right to appeal.

ARGUMENT IN REPLY

I. The Trial Court's Orders Withholding Undisputed Fees Cannot be Justified By the Consortium's Appeal of the Trial Court's 32% Order.

In their Petition for Writ of Mandamus, the Consortium requests relief from both Pretrial Order 49 and Pretrial Order 50.[7] Order 49 prevents Consortium

[6] Birchfield and Herman stand to benefit from a favorable trial court ruling on their pending request to set aside written, court-ordered contracts with Birchfield and Herman for a 2% common benefit fee. Herman and Birchfield now ask the trial court to quadruple the fee to 8%.

[7] Birchfield argues that because the Consortium did not agree to drop its appeal by executing the court's release attached to Pretrial Order 50, it cannot now challenge Pretrial Order 50.

attorneys from obtaining a portion of attorneys' fees amounting to 24% of the final payments to their clients, to which the Consortium attorneys are indisputably entitled even if they lose their appeal of the trial court's 32% order. The trial court in Order 50 allows claimants' attorneys to obtain the same undisputed fees if they "certify" that they will not challenge the 32% order. The Consortium had already filed its Notice of Appeal of the trial court's 32% order when Orders 49 and 50 were issued.

The trial court, and in its defense Birchfield and Herman, attempt to justify Pretrial Orders 49 and 50 by arguing that the Consortium's appeal of the 32% order creates uncertainty over all attorneys' fees. The trial court stated in Pretrial Order 49: "it would be appropriate to escrow [only] 8% of the gross fund for common benefit fees, but for the appeals and objections to the Court's order capping contingency fees at 32%."[8] Similarly, Birchfield asserts that the Consortium's appeal of the 32% order has cast uncertainty over the "final

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Birchfield Response at 17 n.18. ("The Certification procedure contained in Pre-Trial Order 50 is not properly before this Court as the VLC did not participate in this process.") Birchfield apparently contends that the Consortium must sign away its right to appeal before it can seek redress from this Court for the trial court's punitive measures designed to force the Consortium to drop its appeal. That oxymoronic argument serves only to illustrate why mandamus is the Consortium's only relief to preserve its unfettered right to appeal the trial court's order.

[8] Appendix to Petition for Writ of Mandamus ("App.") at # 00004.

percentage."[9] Herman also asserts that the Consortium's 32% appeal has "created 'significant uncertainty' with respect to the fee issue."[10]

But like the trial court, neither Birchfield nor Herman provide a legitimate basis for this alleged uncertainty. Based on the relief requested in the appeal of the 32% order, only two outcomes are possible: (1) the Consortium's contractual fees will be reinstated, or (2) Judge Fallon's 32% order will be sustained. In either case, the Consortium and other similarly situated attorneys would be entitled to nothing less than 32%.[11]

The trial court in Order 49 posited a third possibility as justification for escrowing of fees for attorneys who refused to capitulate to the court's 32% cap. The trial court suggested that, if the attorneys lost the appeal of the 32% order, they could make use of the procedure set up by the trial court to depart from the 32% cap in individual cases, which, the trial court reasoned, could result in an award of less than 32%.[12] As the Consortium explained in its Petition, it has notified the

[9] Birchfield Response at 12; *see also*, *id.* at 14.

[10] Herman Response at 23.

[11] As the Consortium explained in its Petition at pages 6-8, there is a second attorneys' fee issue pending before the trial court that does not relate to this mandamus proceeding. It involves a dispute between common benefit counsel (including Herman and Birchfield) and 57 firms whose clients participated in the Vioxx multi-district proceedings. Herman and Birchfield seek 8% of the total settlement as the common benefit fee, but all common benefit attorneys agreed to 2% in court-approved contracts years before the settlement negotiations began. App. at #00089; App. at #00041. Because this dispute has yet to be resolved, the Consortium does not object to escrowing the 8% sought by common benefit counsel. Birchfield acknowledges at page 15, n.14 of his Response that this common benefit fee dispute is not at issue in this mandamus proceeding.

[12] Pretrial Order No. 49 at 3, App. at #00003.

trial court it will not participate in its variance hearings, and the September 15, 2009 deadline for participation has now passed.[13] There is no possibility that Consortium attorneys will be awarded less than 32% after the 32% appeal.

Birchfield asserts a similar argument.[14] Although he acknowledges that no attorneys have sought to take part in the trial court's variance procedure, and also acknowledges that the Consortium has formally declared that even if it still could, it will not take part in that procedure in the future,[15] he clings to such a variance procedure as the only possible justification for escrowing the 24%. He suggests that this Court may remand the 32% appeal with an instruction to the district court to "make specific findings in individual cases regarding what fee percentages are appropriate."[16] Birchfield's assertion is nonsensical. The Consortium's appeal requests no such relief – it asserts only that the trial court lacked jurisdiction to negate contractual fee amounts. No grounds for Birchfield's speculative remand instruction exist. As a result, no possibility exists that the Consortium would be found to be entitled to less than 32% as a result of the appeal. There simply is no "uncertainty" on this point.

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[13] App. at # 00205—00209.
[14] Birchfield Response at 13-14.
[15] *Id.* at 7-8, 13.
[16] *Id.*

II. Herman's Attack on Consortium Attorneys Is Inaccurate, Irrelevant and Should Be Disregarded by the Court.

Herman incorrectly claims that the Consortium is not "'indisputably entitled' to the fees they claim" based on the trial court's findings in the 32% fee cap order referencing "correspondence and calls from numerous [VLC] claimants protesting a fee higher than 32%."[17] Herman's argument fails on its face because the claimants did not seek a reduction of fees below 32%, and the trial court never suggested these complaints could support reducing fees below the 32% cap announced in the order. The district court has already approved 32% for attorneys who capitulated to the trial court's requirement that they not challenge the 32% order. These findings are therefore irrelevant.

Herman's arguments are also highly misleading, in at least two respects. First, Herman's statement that "The District Court expressly found that '[t]he Clinic reported that they had received correspondence and calls from numerous [VLC] claimants protesting a fee higher than 32%" is false. Herman has no basis for inserting "[VLC]" into that quote. Contrary to Herman's claims, the trial court has not made any such "express" findings with respect to the Consortium, and the evidentiary record for that order is that no Consortium client lodged any complaints.

[17] Herman Response at 11.

Second, Herman provides an inaccurate account of one client complaint against Consortium attorneys – lodged after the trial court's findings referenced by Herman. With no explanation of its relevance to this mandamus proceeding, Herman details a letter complaint by Stacey A. Evering, whose mother passed away a month after taking Vioxx. Ms. Evering's letter alleges improper filing of her settlement materials, lack of communication, false advice that she could back out of the settlement agreement after accepting it, and requests to have her ask the trial court to keep the Consortium's 40% contract fees intact and to use Consortium attorneys to probate her mother's settlement.[18]

None of the complaints is accurate, and the Consortium has sent Ms. Evering a detailed response – with reference to its many records of her case – addressing all of her complaints.

Herman's discussion of Ms. Evering's case is apparently designed to leave the Court with the impression that the Consortium does not deserve to receive its improperly escrowed fees because it caused Ms. Evering to lose her right to participate in the settlement. This is false, as any cursory attempt to find the truth would have uncovered. Ms. Evering has been fully compensated from the Vioxx settlement fund, due to the Consortium's successful appeal from the Claims Administrator's denial of her claim's eligibility for settlement funds. Her Release

[18] Herman Response at 12.

and Stipulation of Dismissal With Prejudice have been delivered to Merck & Co., Inc., for filing.

Herman has apparently also not sought to learn the following facts of Ms. Evering's case before reciting her complaints: (1) none of Ms. Evering's settlement documents were misfiled; (2) Ms. Evering's claim that Consortium attorneys failed to communicate with her for two years from March 2004 to March 2006 is demonstrably false – the Consortium began representing her on March 21, 2005 and communicated with her regularly after that; (3) the Consortium fully identified itself on its contract of representation of Ms. Evering, and on every item of correspondence it sent her thereafter, including the Release she signed accepting the Vioxx settlement; (4) the Consortium sent her an expense report along with her settlement funds; (5) the Consortium never asked any of its clients to contact the trial court regarding its fees; (6) as a courtesy, the Consortium located a probate attorney in her state for her to use if she wished to (in the event that Merck required her to probate her mother's settlement), even though it had no such obligation under its representation agreement.

Ms. Evering's regrettable and misplaced complaint letter is plainly irrelevant to this mandamus proceeding. The Consortium respectfully requests that the Court disregard Herman's improper insertion of Ms. Evering's complaint into this record.

III. Mandamus Must Issue to Correct the Trial Court's Clear Abuse of Discretion and Usurpation of Power.

Mandamus is appropriate when (1) the petitioner has no other remedy, (2) the right to issuance of the writ is clear and indisputable, and (3) the writ is appropriate under the circumstances.[19] These factors are met here.

A. Mandamus is the only remedy to protect the unfettered right to appeal the judge's rulings.

Mandamus is the Consortium's only remedy to protect its "unfettered right" to appeal the trial court's 32% order.[20] A penalty like the one imposed by the trial court here for exercising the legal right to an appeal is a *permanent* deprivation of due process rights.[21] Those rights are improperly penalized even if the Consortium recovers all of its attorneys' fees through a later ruling.[22]

Birchfield and Herman have no response to these key points. They do not dispute that the Consortium has an unfettered legal right to appeal the trial court's 32% order, and they do not deny that the Orders 49 and 50 impose a substantial penalty on that right to appeal.

Herman devotes a major portion of his unelicited response to an entirely irrelevant defense of the trial court's 32% order by touting district courts' general

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[19] *In re Volkswagen*, 545 F.3d 304, 311 (5th Cir. 2008).
[20] *In re Ford Motor Co.*, 988 S.W.2d 714, 722 (Tex. 1998).
[21] *See id.*; *see also United States v. Goodwin*, 457 U.S. 368, 372 (1982) (holding that due process requires that a party cannot be punished for doing what the law allows).
[22] *See In re Ford Motor Co.*, 988 S.W.2d at 722.

authority to reform contingency fee contracts in class action suits.[23] While only arguably pertinent to the appeal of the 32% order (an MDL proceeding is not a class action), Herman's argument has no bearing whatsoever on any issue presented in this mandamus proceeding.

In the same vein, Birchfield claims that the Consortium "seeks to attack the District Court's fee-capping order in a second proceeding," and uses mandamus as a "substitute" for its appeal of the 32% order.[24] That is plainly false. The merits of the 32% appeal are "not before the Court" in this proceeding, as Birchfield himself acknowledges.[25] In this mandamus proceeding, the Consortium seeks only relief from the trial court's punitive orders burdening the right to appeal the 32% order.

Neither Birchfield nor Herman make any credible argument that other relief is available to restore the Consortium's unfettered right to appeal. Unless mandamus issues to relieve the Consortium of the effects of Orders 49 and 50, that right will be permanently lost.

B. The Consortium has a clear and indisputable right to the writ.

The Consortium showed in its Petition that the trial court's orders conflict with several United States Supreme Court and Fifth Circuit holdings that prevent

[23] *See* Herman Response at 17-22.
[24] Birchfield Response at 12.
[25] *Id.* at 10.

improper burdens on the right to appeal,[26] including this Court's recent holding in *In re High Sulfur Content Gasoline Products Liability Litigation*. In *In re High Sulfur*, the Court ruled that "requiring releases from counsel who accepted payment" of their fees is "unauthorized and objectionable."[27] Herman makes no response. Birchfield claims that here the trial court has not required a release.[28] He is clearly wrong. The certification attached by the trial court to Pretrial Order 50 requires attorneys to "expressly and irrevocably waive[] any claim to attorneys fees in an amount greater than 32%"[29] in order to receive the undisputed 24%.

At least one law firm that filed a notice of appeal of the 32% order has, since the trial court issued Orders 49 and 50, moved to withdraw its appeal and has executed the trial court's release in order to obtain its undisputed fees.[30] The trial court's coercive release requirement is just as "unauthorized and objectionable" as

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[26] *See* Petition at 16 (citing *In re High Sulfur Content Gasoline Products Liability Litigation*, 517 F.3d 220, 223-24 (5th Cir. 2008), and 17 (citing *Cooter & Gell v. Hartmarx Corporation*, 496 U.S. 384, 408 (1990) and *Vaughn v. American Honda Motor Co., Inc*, 507 F.3d 295, 300 (5th Cir. 2007)).

[27] 517 F.3d 220, 223-24 (5th Cir. 2008).

[28] Birchfield Response at 17. ("a release is not at issue in this case.")

[29] App. at # 00007.

[30] The Bowersox Law Firm, P.C. filed a motion to withdraw its notice of appeal of the trial court's 32% order on October 27, 2009. It filed Pretrial Order 50 certification that it will not challenge the trial court's order on September 29, 2009, the deadline for filing the certification. *See* App. at # 00007.

the improper release required by the district court in *In re High Sulfur*. This abuse of discretion entitles the Consortium to mandamus relief.[31]

C. The circumstances warrant mandamus relief.

Mandamus is appropriate under these circumstances. As the authorities cited above make clear, district judges do not have the authority to disregard the due process rights of those who attempt to seek appellate review of their rulings.[32]

Herman's attempt to justify the trial court's usurpation of power by arguing this is a multidistrict case in which the trial court has broad inherent powers only underscores the need for mandamus.[33] Given the increase in multidistrict litigation in the Fifth Circuit (and in Judge Fallon's court – he is presently overseeing the Chinese drywall multidistrict proceedings, in which Herman has again been appointed Plaintiffs' Liason Counsel), and the dearth of appellate-level jurisprudence in such cases, this mandamus presents the Court with an opportunity to provide much needed guidance. The Court should make clear for this and future multidistrict proceedings that MDL courts cannot insulate their orders from appellate review by penalizing those who seek that review.

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[31] *See In re Ford Motor Co.*, 2009 WL 2569774 at *8 ("If the district court clearly abused its discretion ...in denying [the] motion, then [the petitioners'] right to issuance of the writ is necessarily clear and indisputable.") (internal quotations omitted).

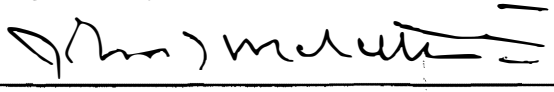
[32] *Cooter & Gell v. Hartmarx Corporation*, 496 U.S. at 408; *Vaughn v. American Honda Motor Co., Inc.*, 507 F.3d at 300; *see also In re High Sulfur Content Gasoline Products Liability Litigation*, 517 F.3d at 223-24.

[33] Herman Response at 17-22.

CONCLUSION

For the reasons stated above, the Vioxx Litigation Consortium respectfully requests that this Court reject the responses of Andy Birchfield and Russ Herman for lack of standing; grant the Consortium's Petition for Writ of Mandamus; vacate the trial court's Pretrial Orders Nos. 49 and 50 as they apply to the Consortium; and instruct the trial court to release from escrow the 24% undisputed attorneys' fees due and owing to the Consortium.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Vioxx Litigation Consortium's Objection to Birchfield and Herman Responses and Reply in Support of Petition for Writ of Mandamus has been forwarded this day to all counsel of record, by LexisNexis File & Serve Advanced in accordance with Pretrial Order No. 8(B).

Austin, Texas, this 29th day of October 2009.

Matthew Baumgartner

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,376 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14 point Times New Roman font.

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Dated: 10/29/2009.

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